SUPREME COURT U.S.
FILED
DEC 27 2002
OFFICE OF THE CLERK

No. 02-643

IN THE

Supreme Court of the United States

MARY FLAHERTY,

Petitioner,

v.

METROMAIL CORPORATION, EXPERIAN CORPORATION, EXPERIAN INFORMATION SOLUTIONS, INC., and EXPERIAN HOLDINGS, as successors in interest to METROMAIL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

None of the Respondents has issued shares to the public. No publicly held company owns 10% or more of the stock of any of Respondents.

Respondent Experian Holdings, Inc. is the corporate parent of Respondent Experian Information Solutions, Inc.

Direct Marketing Technology, Inc. is the corporate parent of Respondent Metromail Corporation (now known as Experian Marketing Solutions, Inc.).

Respondent Experian Corporation ceased to exist on December 31, 1999 as a result of a merger into Respondent Experian Information Solutions, Inc.

Experian North America, Inc. is the corporate parent of Respondent Experian Holdings, Inc.

GUS plc, a publicly traded United Kingdom company, is the ultimate corporate parent of Respondents.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Counterstatement of the Case	2
Reasons for Denying the Petition	11
I. Flaherty Fails to Justify Review by this Court of the Dismissal of Her Claim of Constructive Discharge	12
A. Flaherty's Claims Are Not Ripe for Review Because She Failed to Contest the Applicable Standard Before the Second Circuit and the Second Circuit's Standard Is Unsettled	12
B. Flaherty Failed to Present Evidence Sufficient to Support a Finding in Her Favor Under any Standard	13
II. The Second Circuit Properly Applied Precedent of this Court	17
Conclusion	20

TABLE OF CITED AUTHORITIES

Cases: *Page*

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 18

Glover v. United States,
531 U.S. 198 (2001) 12

Heno v. Sprint/United Mgmt. Co.,
208 F.3d 847 (10th Cir. 2000) 16

Hipp v. Liberty National Life Ins. Co.,
252 F.3d 1208, *reh'g and reh'g en banc denied*,
273 F.3d 1118 (11th Cir. 2001), *cert. denied*,
534 U.S. 1127 (2002) 16

Keeler v. Putnam Fiduciary Trust Co.,
238 F.3d 5 (1st Cir. 2001) 16

Landrau-Romero v. Banco Popular de Puerto Rico,
212 F.3d 607 (1st Cir. 2000) 16

Lappin v. Laidlaw Transit Inc.,
179 F. Supp. 2d 1111 (N.D. Cal. 2001) 13 n.5

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 17

Reeves v. Sanderson Plumbing Prods, Inc.,
530 U.S. 133 (2000) 17

Cited Authorities

Page

St. Mary's Honor Ctr. v. Hicks,
509 U.S. 502 (1993) 17

Texas Dep't of Community Affairs v. Burdine,
450 U.S. 248 (1981) 17

Watson v. Nationwide Ins. Co.,
823 F.2d 360 (9th Cir. 1987) 13 n.5

Whidbee v. Garzarelli Food Specialties, Inc.,
223 F.3d 62 (2d Cir. 2000) 12

Rules:

Fed. R. Civ. P. 56(c) 18, 19

Sup. Ct. R. 10 ..... 1, 19

Respondents Metromail Corporation ("Metromail"), Experian Corporation, Experian Information Solutions, Inc. and Experian Holdings, Inc. respectfully submit this brief in opposition to Mary Flaherty's petition for a writ of certiorari. The United States Court of Appeals for the Second Circuit, affirming the decision of the United States District Court for the Southern District of New York, correctly determined that Flaherty had failed to raise a genuine issue of material fact regarding her claim of constructive discharge.

Flaherty fails to raise any constitutional issues or any other compelling reason for her writ of certiorari to be granted. *See* Sup. Ct. R. 10. Flaherty's argument that the standard for a constructive discharge applied by the Second Circuit and other Circuit Courts is stricter than that utilized by other federal appellate courts is not ripe for review, as she failed to contest the applicable standard before the Second Circuit and the precise contours of that court's standard remain unsettled. In any event, the decisions of the District Court and the Second Circuit confirm that Flaherty cannot prevail under the standard applied in *any* of the appellate courts whose standard she seeks to invoke here. Further, despite Flaherty's suggestion to the contrary, the Second Circuit properly applied controlling authorities of this Court concerning the standards governing employment discrimination claims.

While she seeks to frame her Questions Presented as seeking a resolution of conflicting opinions of the courts of appeal, her attack on the decision below distills to a claim that the Second Circuit failed to properly apply the law to the particular facts of this case. In these circumstances, the writ should be denied. *See* Sup. Ct. R. 10.

COUNTERSTATEMENT OF THE CASE

Flaherty, a former account executive of Metromail, makes numerous misstatements and mischaracterizations of the record in an attempt to convince the Court to grant her petition. Respondents are compelled to correct some of the more egregious of Flaherty's misstatements and mischaracterizations of the record below.[1]

In 1996, the Metromail division that reported to Mike Reynolds, the senior vice president ultimately responsible for Flaherty's group and to whom Beth Hurwitz,[2] Sam Cardonsky, and James Kaiser all reported, was underperforming; Reynolds received constant pressure from Metromail's president to improve the sales numbers of this business unit. (JA 211, 238, 274, 287, 291, 303-05). As a result, Reynolds and his management team decided that those account executives who were under budget as of July 31, 1996 and were not forecast to make their budgeted numbers by the end of the year would receive warning letters. (JA 274-77, 294, 306-07, 314-15). The only exceptions were for those employees who had been in their respective positions for only a short period of time. (JA 307-08).

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1. "JA" references are to the Joint Appendix filed in the Second Circuit below. "Pet. Br." refers to the Petitioner's Petition for Writ of Certiorari. "Pet. App." refers to the Appendix to the Petitioner's Petition for Writ of Certiorari.

2. Flaherty contends that Hurwitz was "transferred to another division" because she would not terminate plaintiff. (Pet. Br. at 3). Flaherty can cite only inadmissible hearsay evidence in support of this contention; indeed, the pages she cites to from her deposition (JA 100-01) contain no evidence – hearsay or otherwise – supporting this allegation. Despite Flaherty's suggestion to the contrary, Hurwitz testified that she was never asked to terminate Flaherty. (JA 250).

Flaherty's actual sales were below her budgeted sales as of July 31, 1996; according to her sales budget report, Flaherty was in excess of $460,000 – or 36% – below budget, and she was not forecast to make budget by the end of the year. (JA 121, 295-97, 319-25). Accordingly, Metromail issued a warning letter to her in August 1996. (JA 100, 121, 325).

Nick Farriella, a male who was approximately the same age as Flaherty and was approximately $60,000 below budget as of July 31, 1996 and not forecast to make budget, also received a warning letter at this time. (JA 123, 326-29). At least four other salespeople outside of Cardonsky's group but within Reynolds' reporting chain also received warning letters; of the six persons in Reynolds' chain of command that received warning letters, four were younger than 40 and four were men. (JA 278-79, 309-11).

Flaherty asserts that Cardonsky failed to transfer accounts to her while he transferred accounts to Farriella and a younger male executive (Cary Zackman). (Pet. Br. at 4). Flaherty does not – and cannot – identify any account that Cardonsky ever took away from her; indeed, Flaherty does not claim that she had any accounts taken from her after the early 1990s and concedes that she recovered from that alleged loss of accounts by 1993. (JA 711-12). Flaherty cannot identify *any* account that was transferred to Farriella during 1996, and she concedes that the transfer of accounts to Farriella would not have affected whether he attained his 1996 budget. (JA 158-61, 164-65, 433). Moreover, Farriella had been removed from several other major accounts, and he thus had time to devote to new accounts. (JA 162-63, 172, 213-217, 735). Cardonsky concluded that Farriella would be a good personality fit with one of these accounts, transferred to Farriella at the beginning

of 1997, and had the ability to "wrestle" the account back from another Metromail facility. (JA 159, 216, 218-19, 222-223-1). With respect to the account transferred to Zackman, Cardonsky testified that he thought Zackman's personality would be a good match with the personalities of the client contacts at this account, and that because this Pennsylvania account required regular attention – up to three visits a month – Zackman, a New Jersey resident, was geographically well-suited for the assignment. (JA 217-18).

Flaherty failed to attain her budgeted sales figures as of December 31, 1996. (JA 155-57, 330-38). Nevertheless, she was not terminated or otherwise disciplined. (JA 128, 167-68).

In a reorganization in December 1996 or January 1997, Reynolds ceased to have authority for Flaherty's division. (JA 288-89, 300-02). Shortly thereafter, Cardonsky took on other responsibilities and Kaiser, who was based in Illinois, became Flaherty's manager.[3] (JA 111, 166, 168, 228-29, 258-

3. Confronted with the utter lack of any wrongdoing to assert against Kaiser, Flaherty seeks to bridge the gap between Reynolds and Kaiser by asserting that Kaiser was a "protégé" of Reynolds (Pet. Br. at 4), but can cite no authority for the theory that when one manager has recruited another manager and the two are friendly (the most that she can allege here), some type of discriminatory chain has been established. It is undisputed that Reynolds ceased to have authority for Flaherty's division before Kaiser became Flaherty's manager and, as of early 1997, had left Metromail.

Flaherty seeks to connect Cardonsky to Kaiser based on alleged conversations between the two at or about the time Kaiser assumed responsibility for the publishing group. Her attempts to ascribe a sinister tone to Kaiser's benign testimony fail; the record reflects (Cont'd)

60). In addition to assuming new duties supervising the publishing group, Kaiser retained supervisory duties over the financial services group. (JA 259-60). As of early 1997, both Cardonsky and Reynolds had left Metromail. (JA 111, 288-90).[4]

Flaherty strongly suggests that these organizational changes significantly improved her working conditions and state of mind. Indeed, she asserts that the warning letter was "withdrawn" and that "when . . . Reynolds left, [she] just assumed that everything was gone [sic] back to normal." (JA 54 ¶ 28, 167-68).

Flaherty's major business disappointment during Kaiser's tenure apparently concerned his decision not to transfer the Doubleday account to her in February 1997. (Pet. Br. at 5). The Doubleday account was instead transferred from Farriella to Elyssa London, a younger female account executive who – as Flaherty concedes – had just lost another

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(Cont'd)
only that Kaiser would have to consider organizational politics in light of the fact that (i) under Reynolds, there were specific review procedures in place to evaluate the account executives in his division; (ii) because of the reorganization in December 1996 or early 1997, Reynolds would no longer have authority for that division; and (iii) Reynolds' procedures would not necessarily be followed by other divisional managers. (JA 510-16).

4. Flaherty claims that Cardonsky was terminated (Pet. Br. at 4), but nothing in the record supports this untrue factual assertion. Below, she cited to a statement in Respondents' answer that "Cardonsky's employment with Metromail was terminated in or about January 1997" (JA 37 ¶ 26), erroneously presuming that his employment was terminated *by Metromail* when, in fact, the answer says no such thing and there is no evidence supporting her assumption.

large account. (JA 173-75, 208). Doubleday had been unhappy with Metromail's service and asked that Farriella be removed from the account. Although Kaiser ultimately deferred to Doubleday's demand that Farriella be removed, Kaiser believed that the problems with the account had arisen in the production process and concluded that the new salesperson should be someone with a record of being able to bring pressure to bear on Metromail's production personnel. Based on his previous experience with London – she had been in his group for some time – Kaiser believed she would be more effective than Flaherty in fighting with the production personnel to ensure that the customer's expectations were met. (JA 268-70, 272-73). London had significant experience, had worked successfully on another large publishing account, and Kaiser was unaware (neither Flaherty nor anyone else told him) that Flaherty apparently had been assigned to the Doubleday account years earlier. (JA 264-73).

Flaherty's allegation that "Kaiser assigned the account to a younger female executive . . . even though both Doubleday and the internal person at Metromail who dealt with the account had requested that Ms. Flaherty be assigned to the account" (Pet. Br. at 5) distorts the record. Doubleday merely "suggested [that Kaiser] might want to consider assigning . . . Flaherty to the account," and there is no evidence it objected when London was assigned. (JA 727). And the person at Metromail who was responsible for the production aspects related to Doubleday told Kaiser that "London was very capable and competent but sometimes difficult to deal with; and she would need [Kaiser's] help if [he] made that decision," and that "she would have no problem if [Kaiser] assigned . . . Flaherty;" indeed, that London would be more effective at bringing pressure on the production people weighed in Kaiser's decision to assign her the account. (JA 267-73).

At the time Kaiser assumed his new duties, he decided and announced that he would not meet with *any* clients – whether they were clients of Flaherty, Farriella, London, or anyone else – during the first ninety days of his tenure as manager of the publishing group. (JA 261-62). The *sole* client meeting he did attend during this period was with Doubleday; advised that the account was in jeopardy, he agreed to meet with the client, with the result that Farriella was taken off the account. (JA 261-62, 265-66, 720-21).

Flaherty asserts that "Kaiser repeatedly failed to meet with one of [her] significant accounts" (Pet. Br. at 5); in fact, the record reflects that this client was the *only* client besides Doubleday that Kaiser attempted to contact during the 90-day period, and that he tried calling "more than one" time, although they never spoke. (JA 185-87, 208, 262, 723-25). Flaherty has no evidence that Kaiser visited clients of any other account executive (other than Doubleday) during this period. (JA 187-88, 208).

Flaherty also asserts that Kaiser "stood her up without cancelling a scheduled meeting" (Pet. Br. at 5); Flaherty, however, has no idea why Kaiser did not show up for their scheduled meeting – she never asked him – and has no idea whether he missed any other appointments that same day with other salespeople. (JA 179-80, 184-85). Kaiser could not recall why he missed the meeting. (JA 263). Further, it is undisputed that Kaiser missed meetings with other people as well. (JA 726).

As Flaherty concedes, Kaiser never made any gender-based or age-based comments to or about her (JA 171, 196-97) and interceded on her behalf with respect to a problem with one of her accounts. (JA 180-81). She makes no claim that Kaiser had ever raised the issue of retirement with her.

Flaherty began to seriously contemplate retirement in March or April 1997, but did not communicate her intentions to Kaiser until May 15, 1997. (JA 176-78, 194, 205, 208). In June, Flaherty confirmed that she would be retiring and selected November 1, 1997 as the effective date for her retirement. (JA 189, 192-93, 206-07, 344). Her last day at Metromail was November 1, 1997. (JA 108, 195, 207, 208).

Thereafter, Flaherty commenced this action against Respondents, asserting that she had been discriminated against on the basis of her age, her gender, and some combination of those two factors, all of which had resulted in the constructive termination of her employment. The District Court initially found her claims untimely and dismissed her action. (Pet. App. at 41a-50a). The Second Circuit reversed that determination and remanded the case to the District Court. (Pet. App. at 1a-10a).

On remand, by opinion and order dated July 31, 2001, the District Court granted Respondents' renewed motion for summary judgment. (Pet. App. 11a-25a). The District Court held that Flaherty failed to demonstrate that she was constructively discharged on the basis of her age or gender, in light of the fact that "*[d]rawing all reasonable inferences in favor of Flaherty, no trier of fact could find her 'working conditions . . . so difficult or unpleasant that a reasonable person in [her] shoes would have felt compelled to resign.*'" (Pet. App. at 18a) (emphasis added) (citing *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir. 1996)) (alterations in District Court decision). The District Court cited the following record evidence as compelling its holding: (1) Flaherty conceded that Kaiser "never made any ageist or sexist comments to or about her, . . . interceded on her behalf to resolve a problem with one of her accounts, and . . . never

raised the issue of retirement with her" (Pet. App. 13a-14a); (2) the acts allegedly committed by Kaiser – indicating to Flaherty she was expected to meet her budget, missing a meeting with her, and making a business decision to give the Doubleday account to another female employee (Pet. App. at 19a) – were "plainly insufficient to demonstrate that a reasonable person would have felt compelled to retire in their face" (Pet. App. at 19a-20a); (3) "much of what Flaherty bases her constructive discharge claim upon is conduct which occurred years earlier and involved people who were no longer supervising her at the time of her retirement" (Pet. App. at 20a); (4) the timing of Flaherty's decision to retire and subsequent resignation – she first considered retiring in March or April 1997, spoke with Kaiser about this option on May 15, 1997, formally submitted her resignation approximately a month later in June 1997, yet remained an employee until November 1, 1997 – "belie[d] her contention that her working conditions were 'so intolerable' that she was compelled to leave" (Pet. App. at 18a); and (5) Flaherty failed to present any evidence that Metromail had tried to force her to retire because of her age or gender. (Pet. App. at 21a-23a). The District Court also correctly relied on the record evidence that Kaiser expressed his business judgment that London would be better suited for the Doubleday account, and the fact that Flaherty had not presented any evidence that the proffered reasons for the decision were pretextual. (Pet. App. at 14a-15a, 23a).

The Second Circuit affirmed the District Court's decision. (Pet. App. at 26a-30a). The Second Circuit summarized the numerous reasons for the District Court's decision, recognizing that "*[t]he lower court reasoned that [Flaherty] did not offer sufficient evidence that her working conditions were so intolerable that a reasonable person in*

her shoes would have felt compelled to resign." (Pet. App. at 28a) (emphasis added). In analyzing the propriety of the District Court's decision, the Second Circuit utilized the following standard:

> A claim for constructive discharge exists when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. *Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.*

(Pet. App. at 29a) (internal quotations omitted) (emphasis added).

Although the Second Circuit rejected the District Court's reliance on the fact that Flaherty continued to work for months after giving notice of resignation as a basis for its holding (Pet. App. at 29a), the Second Circuit affirmed the judgment of the District Court based in large part on the other factors relied upon by the District Court:

> *We affirm the dismissal of her complaint on the ground that she fails to raise a disputed issue of material fact regarding the presence of objectively intolerable working conditions deliberately created by her employer at the time of her resignation.* Flaherty conceded that, to her knowledge, Kaiser had never made a discriminatory remark to or about her. *And the conduct that Flaherty proffers as evidence of Kaiser's deliberate efforts to compel her to resign is inadequate to establish a prima facie*

> *case that her work environment was intolerable* and that Kaiser was engaged in intentional efforts to compel her to resign. Any past discrimination she allegedly experienced under her earlier supervisors is not, in the particular circumstances of this case, sufficiently linked to working conditions under Kaiser to support a constructive discharge claim, since the earlier supervisors had left the company and no longer dealt either with the plaintiff or with Kaiser.

(Pet. App. at 30a) (emphasis added).

REASONS FOR DENYING THE PETITION

Flaherty asserts that (i) the standard used in the Second Circuit concerning claims of constructive discharge – Flaherty alleges that under this standard an employee must prove that a reasonable person would have felt compelled to resign under the circumstances and that the employer deliberately intended to force her resignation – is a minority view in conflict with other appellate courts which require only that a reasonable person would have felt compelled to resign under the circumstances (Pet. Br. at 7-11); and (ii) the Second Circuit required that she proffer direct evidence of Metromail's intent and that this supposed requirement is inconsistent with this Court's precedent. (Pet. Br. at 12-14). Each of these arguments is based upon a misreading of the decision below and is otherwise without merit.

I. FLAHERTY FAILS TO JUSTIFY REVIEW BY THIS COURT OF THE DISMISSAL OF HER CLAIM OF CONSTRUCTIVE DISCHARGE

A. Flaherty's Claims Are Not Ripe for Review Because She Failed to Contest the Applicable Standard Before the Second Circuit and the Second Circuit's Standard Is Unsettled

As an initial matter, Flaherty's argument that the standard for a constructive discharge claim applied in the Second Circuit and certain other courts of appeal is inconsistent with other courts of appeal is not properly before this Court. In her appeal to the Second Circuit, Flaherty agreed with the standard utilized by that court for constructive discharge claims and never raised or suggested that the standard was incorrect or should be modified; she never even asserted that other courts of appeal disagreed with the Second Circuit. She should be barred from presenting these contentions for the first time in her petition to this Court. *See Glover v. United States*, 531 U.S. 198, 205 (2001).

Moreover, although the Second Circuit requires both that a reasonable person in the employee's shoes would have felt compelled to resign and that the employee prove deliberate action by the employer to prove a constructive discharge occurred, the law in the Second Circuit is "unsettled" as to the meaning of "deliberate." *See Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 74 (2d Cir. 2000) (requiring "something beyond mere negligence or ineffectiveness"). At a minimum, Flaherty should have sought to clarify the Second Circuit's standard before seeking to raise the issue to this Court.

B. Flaherty Failed to Present Evidence Sufficient to Support a Finding in Her Favor Under any Standard

In any event, the decisions of the District Court and the Second Circuit confirm that Flaherty cannot prevail on her constructive discharge claim under any standard she seeks to invoke. As Flaherty concedes, all of the federal appellate courts require, at a minimum, that an employee satisfy an objective test requiring that a reasonable person would have felt compelled to resign under the circumstances. (Pet. Br. at 8).[5] As the decisions below make clear, she failed to present evidence sufficient to meet even this more limited standard.

As described above, the District Court ruled that "[d]rawing all reasonable inferences in favor of Flaherty, no trier of fact could find her 'working conditions . . . so difficult or unpleasant that a reasonable person in [her] shoes would have felt compelled to resign.'" (Pet. App. at 18a) (citing *Chertkova*, 92 F.3d at 89 (2d Cir. 1996)) (alterations in District Court decision). Similarly, the court found that "the incidents Flaherty cites as evidence of her intolerable work environment simply are insufficient to demonstrate that a reasonable person would have felt compelled to retire." (Pet. App. at 19a).

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5. Flaherty has misstated the standard applied by the Ninth Circuit. In that court, a plaintiff must also "show some aggravating factors, such as a continuous pattern of discriminatory treatment." *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987) (internal quotations omitted and emphasis in original deleted). *See also Lappin v. Laidlaw Transit Inc.*, 179 F. Supp. 2d 1111, 1127 (N.D. Cal. 2001) (confirming standard applied in Ninth Circuit).

After analyzing the underpinnings of the numerous reasons for the District Court's decision, the Second Circuit affirmed the District Court's decision and, with one exception, substantially adopted the factors underlying the lower court's decision: "We affirm the dismissal of her complaint on the ground that she fails to raise a disputed issue of material fact regarding the presence of objectively intolerable working conditions deliberately created by her employer at the time of her resignation." (Pet. App. at 30a). Indeed, after recognizing that "working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign" (Pet. App. at 29a), the Second Circuit expressly ruled, among other things, that "the conduct that Flaherty proffers as evidence of Kaiser's deliberate efforts to compel her to resign is *inadequate to establish a prima facie case that her work environment was intolerable*." (Pet. App. at 30a) (emphasis added).

The lower courts' dismissal of Flaherty's constructive discharge claim was mandated by the record evidence adduced on summary judgment, which was insufficient to support a finding that an intolerable environment existed at the time Flaherty decided to resign. Indeed, given the timing and nature of her allegations, Flaherty could not deny that her working conditions had not significantly improved under Kaiser in 1997 as compared to August/September 1996 – the time when she claimed most of the alleged discriminatory acts occurred. The warning letter was, according to her, "withdrawn," and she asserted that "when . . . Reynolds left, [she] just assumed that everything was gone [sic] back to normal." (JA 54 ¶ 28, 167-68). Similarly, she conceded that Kaiser never made any gender-based or age-based comments to or about her (JA 171, 196-97), acknowledged that he

interceded on her behalf with respect to a problem with one of her accounts (JA 180-81), and never asserted that Kaiser had ever raised the issue of retirement with her.

Flaherty nonetheless complained below that certain actions allegedly taken by Kaiser were discriminatory: telling her she would have to prove herself and bring up her budget, refusing to attend client meetings during the first ninety days of his tenure with the publishing group, missing a scheduled meeting between the two of them, refusing to meet with American Express, and assigning the Doubleday account to London. (*See* JA 168-70, 174-75, 179, 183-85). But the fact that a new manager told Flaherty she would have to prove herself and bring up her budget neither evidenced discrimination nor supported a claim that her working conditions were made intolerable, especially given her failure to come anywhere close to making her budget for 1996. Similarly, as discussed *supra*, neither (i) the decision not to meet with *any* clients during the first 90 days after he assumed his new duties – he met with Doubleday because he was advised the account was in jeopardy and the only other client he attempted to contact during this 90-day period was Flaherty's; (ii) the missed meeting – Flaherty has no idea why Kaiser did not show up (she never asked him) and has no idea whether he missed any other appointments that same day with other salespeople; (iii) the transfer of the Doubleday account – Kaiser believed London would be more effective than Flaherty in fighting with the production personnel to ensure that the customer's expectations were met; nor (iv) Kaiser's alleged failure to meet with American Express – he tried calling the client more than once, but they never spoke – could support a finding that a reasonable person would have felt compelled to resign.

Decisions from jurisdictions that utilize only a reasonable person test further confirm that Flaherty would not have prevailed in those jurisdictions either. *See, e.g., Hipp v. Liberty National Life Ins. Co.*, 252 F.3d 1208, 1236-37 (constructive discharge claim not supported by the evidence when employee remained at his employer for several months after the allegedly discriminatory confrontations occurred and most of his complaints related to manager's management style), *reh'g and reh'g en banc denied*, 273 F.3d 1118 (11th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002); *Keeler v. Putnam Fiduciary Trust Co.*, 238 F.3d 5, 9-10 (1st Cir. 2001) (affirming grant of summary judgment because "'constructive discharge' usually describes harassment so severe and oppressive that staying on the job while seeking redress is intolerable" and none of the employer's actions reached this magnitude); *Landrau-Romero v. Banco Popular de Puerto Rico*, 212 F.3d 607, 613 (1st Cir. 2000) (dismissal of plaintiff's constructive discharge claim was proper because his "resignation came too late after the offensive conduct to be labeled a constructive discharge" and "a plaintiff [who] does not resign within a reasonable time period after the alleged harassment . . . was not constructively discharged"); *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 857-58 (10th Cir. 2000) (plaintiff's evidence that, among other things, she believed she was being isolated, she was suffering from depression attributed to her working conditions, and employer suggested she might do better in a different department, was insufficient to establish a constructive discharge claim as a matter of law).

Flaherty failed to marshal evidence sufficient to support a finding that her working conditions were so intolerable that a reasonable person would have felt compelled to resign. Because her claim would thus fail under any standard employed by any of the courts of appeal, this case is not appropriate for review by this Court.

II. THE SECOND CIRCUIT PROPERLY APPLIED PRECEDENT OF THIS COURT

Flaherty strangely asserts that the Second Circuit improperly "introduced an additional burden in a constructive discharge case that the plaintiff offer direct evidence of the employer's intent." (Pet. Br. at 12). But nowhere in the Second Circuit's decision does that court state that Flaherty was required to submit "direct evidence" of Metromail's intent, and the Second Circuit neither explicitly nor implicitly required that Flaherty present direct evidence of anything. Rather, the court below properly applied the test articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny in ruling that she failed to demonstrate the existence of material issues of fact such that her claim could survive summary judgment.

To analyze employment discrimination cases, the Court has devised a three-step method of proof that relies on presumptions and shifting burdens of production. *See McDonnell Douglas*, 411 U.S. at 801-07. Under *McDonnell Douglas*, a plaintiff has the initial burden of establishing a prima facie case of discrimination. *See Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 142 (2000); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas*, 411 U.S. at 802. To establish a prima facie case, a plaintiff must show that (i) she belongs to a protected class; (ii) was qualified to perform the duties required by the position; and (iii) suffered an adverse employment action (iv) under circumstances giving rise to an inference of discrimination. *See generally Reeves*, 530 U.S. at 142; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *McDonnell Douglas*, 411 U.S. at 802.

The initial burden imposed upon Flaherty by the Second Circuit is identical to that required under *McDonnell Douglas* and its progeny:

> To establish a prima facie case for unlawful termination of employment under the ADEA or Title VII, an employee must show: (1) that she was qualified for the job, (2) that she was within the protected group, (3) that she was either actually or constructively discharged, and (4) that the discharge occurred under circumstances giving rise to an inference of age or gender discrimination.

(Pet. App. at 29a; *see also* Pet. App. at 17a-18a (District Court articulation of *McDonnell Douglas* standard)).

Consistent with this Court's precedent, the Second Circuit required only that Flaherty submit evidence sufficient to support a finding that she had been constructively discharged on the basis of her age and/or gender – a showing that it properly ruled she had failed to make. The issue was not her failure to present "direct evidence" – it was her failure to present *any* evidence sufficient to support a verdict in her favor.

Finally, Flaherty challenges the Second Circuit's application of controlling law concerning the scope of Rule 56 of the Federal Rules of Civil Procedure. (*See* Pet. Br. at 14). Rule 56(c) "mandates the entry of summary judgment . . . against a [non-moving] party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). It is beyond dispute that the Second Circuit's

decision was wholly consistent with Rule 56: "We review a district court's grant of summary judgment de novo. . . . A motion for summary judgment may not properly be granted unless 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" (Pet. App. at 28a-29a (citing Fed. R. Civ. P. 56(c)); *see also* Pet. App. at 16a-17a (District Court discussion of Rule 56)). Because Flaherty cannot contest the Second Circuit's statement of the applicable standard, she is left to argue – having lost the argument twice below – that the court misapplied that standard. But here she fails to justify the granting of the writ, as she is simply wrong – the court's determination was compelled by the lack of evidence supporting her claim – and she fails to proffer a proper justification for granting of the writ. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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